DECODING THE MERS MORTGAGE

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Laws are like cobwebs, which may catch small flies,
but let wasps and hornets break through.

Jonathan Swift
A Tritical Essay upon the Faculties of the Mind

Introduction

A few years back, the denizens of Wall Street seized upon the idea that there was a lot of money to be made by taking thousands of mortgage loans, mixing them together, and baking them, so to speak, into a large pie, the many small pieces of which could then be sold on the secondary market as mortgage-back securities.

Clearly no sensible investor would relish the possibility of her investment being clawed back into someone's bankruptcy estate, and so one of the first orders of business was to safely distance each mortgage loan from whatever economic misfortune and subsequent liability might befall the originating lender. The solution, simple in theory, was to transfer ownership of every mortgage loan slated for the pie to a company with no assets and no liabilities, thus making them bankruptcy remote. The key word here is *transfer*—that is to say, a true sale of the mortgage by the originating lender.

In practice, however, it soon evolved into a process of mind-boggling complexity involving multiple parties governed by multiple documents, many of which are typically hundreds of pages in length. And it was a process that involved not simply one, but *multiple transfers of ownership*—a point to bear in mind during the present discussion. This meant that there would be more tracking to do, more assignments to draft, and more feet on the ground at the local land office ill-equipped as it was to handle the spike in volume. The trouble and expense would be prohibitive.

The industry response was to design, as an alternative, what turned out to be a private and in many respects secretive registry that would, among other things, not only track mortgage loans electronically and far more efficiently but also eliminate the need to produce—and, for safety's sake, record—a written assignment every time a mortgage loan changed hands. Thus from this union of concerns there was born in the final years of the Twentieth Century a lovechild: MERS, the Mortgage Electronic Registration

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Systems, Inc. Its first objective proved fairly straightforward; the second, which is the subject of the present discussion, would be problematic—not because the concept itself was wrongheaded, but because of the way in which it would be carried out.

Simply put, there are flaws in the MERS model—flaws that may well call into question not only the legality of a potentially staggering number of foreclosures but also the integrity of an equally staggering number of titles to real property in cases where there has been no foreclosure. But even beyond this, the opacity of the MERS model has come to be seen by unscrupulous players within the industry as an ideal medium in which to launder material defects in the chain of title and conceal further violations of state and federal law. This is of course proving itself to be a risky business: that same opacity, once understood and thus removed, is a point of entry to a trail at the end of which stands the real person to whom such mischief ultimately owes itself—the person who gave the order and might bear the risk of prosecution for having given it.

As we delve into the specifics, it would be useful to bear in mind that the present discussion is based upon Massachusetts law. Massachusetts is a non-judicial foreclosure state in which a foreclosure may be carried out privately by power of sale—though it is absolutely clear that the power of sale may only be exercised by the person who actually owns the mortgage or stands in the owner's shoes.[2] Massachusetts is also a title-theory state in which an assignment of mortgage is considered to be the transfer of an interest in land subject to the statute of frauds, and in which the mortgage doesn't necessarily follow the note but may be held by a different person.[3] In such a case, the mortgagee is deemed to hold the mortgage in something akin to a resulting trust for the holder of the note.[4]

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[2] M. G. L. c. 183, § 21; M. G. L c. 244, §§ 11-17C; *U. S. Bank National Assn. v. Ibáñez*, 458 Mass. 637, 646-648, 651 (2011).

[3] *Ibáñez*, 458 Mass. at 649, citing *Lamson & Co.* v. *Abrams,* 305 Mass. 238, 245 (1940).

[4] *Ibáñez*, 458 Mass. at 652-53:

> In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Barnes v. Boardman, 149 Mass. 106 , 114 (1889). Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. Id. ("in some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law. . . . This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity"). See Young v. Miller, 6 Gray 152 , 154 (1856). *In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another.* G. L. c. 183, § 21, inserted by St. 1912, c. 502, § 6 [emphasis added].

Therefore, in order to establish ownership of the mortgage and the right to foreclose, the number of assignments must equal the number of transfers that have taken place in any particular case. The point has been clearly made by the Supreme Judicial Court:

> *(T)here must be proof that the assignment was made by a party that itself held the mortgage.* See In re Samuels, 415 B.R. 8, 20 (Bankr. D. Mass. 2009). A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. See In re Parrish, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005) ("If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden *through evidence that traces the loan from the original lender to the claimant*"). The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14) [5]

In short, we are long past a time in Massachusetts when ownership of a mortgage could be soundly determined merely by trotting out the original mortgage contract, a lone assignment to the person exercising the power of sale, and perhaps a foreclosure deed spawned by that assignment. Securitization, with its system of multiple transfers, has changed the entire dynamic of foreclosure law, and to accept these three documents alone as prima facie proof of ownership is to force the jurisprudential foot into a shoe that has seen its day and simply no longer fits; it is atavistic and simply wrong.

The Methodology

Perhaps if its goal been more thoughtfully studied and weighed the industry might have come up with a more viable plan. Why this did not happen is open to speculation, though it likely owed itself to a conjunction of factors, some perhaps more honorable than others. Whatever the reason, it is fair to say that in the end the industry settled on a recipe that combines rhetorical smoke and mirrors with a dollop of doublespeak folded with a smile befitting Carroll's Cheshire Cat into a standardized mortgage contract, hopeful that judge and jury will gaze with trembling lip and joyful tear upon the elegance of it all while of course casting aside some hapless homeowner's plea for fairness and

[5] *Ibáñez*, 458 Mass. at 651 (emphasis added). There must be an assignment with every transfer lest we make nonsense of the Court's articulation of the law. A single transfer from the current record holder in a case where there have been multiple prior transfers would not rule out the possibility of an earlier break in the chain of ownership. This has now been codified in Chapter 194 of the Acts of 2012, which, among other things, amends M. G. L. c. 244, § 14 and carries *Ibáñez* a step further by requiring not only an unbroken chain of assignments but the actual recording of each one. There could be no clearer expression of the Legislative intent or the tenor of public policy in Massachusetts.

equality before the law. Although this approach has for a time enjoyed some measure of success, it has begun to reveal itself for the defective thing it truly is, thanks in no small part to a handful of judges and lawyers who have had the insight and impartiality to know better—and the courage to demand that there be a level playing field.[6]

In theory, the way it all works is for MERS to remain the mortgagee of record no matter how many times ownership of the mortgage changes hands amidst shadows and whispers beyond the walls of an imperfect and yet transparent and democratic recording system until the mortgage is either discharged, assigned to someone outside the MERS system, or foreclosed; then and only then must an assignment be made and recorded.[7] It is here that we enter into a kind of parallel universe the molecular stuff of which consists in no small part of wishful thinking. Here is why.

It goes without saying that for MERS to remain the mortgagee of record and to have authority to assign a mortgage without fraudulently misrepresenting itself it must either *be* the actual mortgagee (which in Massachusetts is the holder of legal title to the secured property) or it must be acting in a *representative* capacity *on behalf of* the actual mortgagee. In other words, it must be either principal or agent. As it is, the industry has been more than generous in this regard: the MERS mortgage contract bestows upon MERS *both* titles. We are told:

> "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting *solely as a nominee* for Lender and lender's successors and assigns. *MERS is the mortgagee* under this Security Instrument.

And further:

> Borrower does hereby Mortgage, grant and convey to MERS (*solely as nomine* for Lender and Lender's successors and assigns) *and to the successors and*

[6] Let it be said that a mortgage loan entails two separate and distinct contracts, a promissory note and a mortgage. No law supports the proposition that an alleged breach of the promissory note on the borrower's part justifies a breach of the mortgage contract on the holder's part—especially when, as in Massachusetts, a breach of the mortgage contract is a violation of foreclosure law. *See* M. G. L. c. 183, § 21. Let it be further said that to offer a reasoned analysis of the MERS model in its present form is not to gainsay the value of economy and efficiency, nor is it a criticism of the free market system; on the contrary, one of the most serious blows to the free market system in recent times owes itself in substantial part to the handiwork of unscrupulous individuals who exploit the MERS model in order to get away with a licentious disregard for the rules of the road by which that system must operate in order to remain truly free.

[7] This is somewhat tenderly known as the "MOM mortgage" (MERS as original mortgagee). It is also possible for MERS to become the mortgagee of record by subsequent assignment where the mortgage has been given to the originating lender.

> *assigns of MERS*, with power of sale, the following described property . . . [emphasis added].[8]

This rather strident ambiguity has become grist for debate among judges, lawyers, and scholars. After all, how could MERS be both principal and agent with regard to the same interest at the same time?[9] Are we present at the creation of an entirely new species of legal entity, or are we simply dealing with a round of sloppy draftsmanship? A careful examination of the MERS model reveals that it is something altogether different, that its schizoid personality is in fact the lynchpin of an ingenious device by which to make good on the industry's promise to eliminate the need for multiple assignments. But in the end, it fails of its essential purpose and is at best quixotic. At worst it serves to poison the wellspring of transparency and fairness essential to a free society. Let us take a closer look, beginning with the role of MERS as nominee or agent.

MERS as Representative

Yes, if an originating lender has retained the mortgage, he should, barring any law or contractual provision to the contrary, be able to assign it, either directly or through an agent such as MERS. But, as previously mentioned, when the mortgage is not retained by the originating lender and changes hands *a number of times*—as in the securitization process—we have an entirely different dynamic. This is not to suggest that MERS may not by agreement also assign the mortgage on behalf of *subsequent* owners. *The critical question, however, is not whether MERS may do so but whether the person on whose behalf the assignment is being made in fact owns the mortgage.*

By way of illustration, let's say that Charlie Brown decides to sell his bottle cap collection to Lucy for five cents, and that he hires Snoopy to handle the sale. In the meantime, Lucy, though she hasn't yet bought the collection but is quite the entrepreneur, also hires Snoopy to sell it to Pig Pen for seven cents once it is hers to sell. Let us further say that Pig Pen, in turn, also hires Snoopy to sell the collection to Woodstock for nine cents once it is his to sell. And finally, let's say that they all live in a state in which the sale of a bottle cap collection comes within the statute of frauds and that it must be memorialized by a writing signed by the party to be bound.

But lurking behind this seemingly typical business scenario is a question, and it is this: *does the mere fact that they have all decided to use Snoopy as their agent somehow*

[8] MERS could only have its own successors and assigns if it *owned* the mortgage; otherwise the successors and assigns would be those of the originating lender, not MERS itself.

[9] *See e.g. Landmark Nat'l Bank v. Kesler,* 216 P.3d 158, 165-66 (Kan. 2009) (stating that MERS defines its role "in much the same way that the blind men of Indian legend described an elephant—their description depended on which part they were touching at any given time"); *Culhane v. Aurora Loan Services of Nebraska,* 826 F. Supp. 2d 352, 369-370 (D. Mass. 2011).

transfer ownership of the collection from one to the other even though no sale has actually taken place? The question might seem silly were it not for the fact that this is precisely the industry's position—one that continues upon occasion to be swallowed hook, line, and sinker without further examination by an unsuspecting judge; in other words, it is deemed to be so simply because the industry says that it is so.

In point of fact, the answer is an emphatic *no*—and the first reason for this lies in a well-settled principle of agency law: that there is always a functional identity between principle and agent, a melding of the two with regard to a defined set of rights and responsibilities. One aspect of this is that an agent may only do for the principal what the principal herself may do and may therefore only sell on the principal's behalf what is the principal's to sell in the first place.[10] Yes, Snoopy may sell the bottle cap collection, *but only if authorized to do so by the person who actually owns it—and no Massachusetts law supports the proposition that ownership of a mortgage passes legally from one person to another during the securitization process merely because they have all decided to use the same agent*.[11] The point is elementary, and whenever it continues to escape

[10] The concept of agency, at common law, rests on the long-established principle that he who acts through another acts by himself—*qui facit per alium, facit per se.* H. Alperin, Agency, 14 M.P.S. § 1 (4th ed. 2006) (citing *Arkansas State Board of Architects v. Bank Building & Equipment Corp. of America,* 225 Ark. 889. 286 S. W. 2d 323, 327 (1956)). *See also Patterson v. Barnes,* 317 Mass. 712, 723 (1945). *See* Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership* § 1 (2d ed. 1990) ("The basic theory of the agency device is to enable a person, through the services of another, to broaden the scope of his activities and receive the product of another's efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed.").

Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling."); *Id.,* comment a; *Peters v. Haymarket Leasing, Inc.,* 64 Mass.App.Ct. 767, 774 (2005) ("The label placed by the parties on their relations is not dispositive, and subterfuges are not countenanced.") (citing *S.G. Borello & Sons v. Department of Industrial Relations,* 48 Cal. 3d 341, 349 (1989). Not least, an agent may only do what the principal himself may do and, conversely, may not do what the principal himself might not do were he to act on his own behalf. *See* 2A C.J.S. *Agency* § 129 (2003) and cases cited therein. *See also* Nolan Robinson, Note, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure,* 32 Cardozo L. Rev. 1621, 1643-44 (2011) ("[A]n agent cannot augment the power of its principal, nor can a principal grant rights to an agent that the principal does not itself possess."), quoted in *Culhane,* Memorandum and Order at 35. *See also Lehman Bros. Commercial Corp. v. Minmetals Intern. Non-Ferrous Metals Trading Co.,* 179 F. Supp.2d 118, 148 (S.D.N.Y. 2000), citing *Anglo-Iberia Underwriting Management Co. v. PT Jamsostek*, No. 97 Civ. 5116, 1998 WL 289711, at *3 (S.D.N.Y. June 4, 1998).

Although an agency relationship is said not to merge, virtually, the principal's personality into that of the agent or that of the agent (whether as an individual or an organization with a distinct legal personality) into that of the principal, (Restatement (Third) of Agency § 1.01 comment c (2006)) the reason for this lies in the fact that the agent's role is limited—that is to say, the agent acts within parameters set by the principal and remains under the control of the principal. Nonetheless, *the agency relationship is principal-specific*; the agent acts presumptively *on behalf of* the principal and there is thus *a functional identity* between the two if not an identity in fact. This is a key point. It means that when the agent acts, it is in effect the principal who acts, even if the "act" is to hold legal title in a secured property.

[11] To entertain the possibility that Lucy might have intended from the start to profit also from the eventual unraveling of this adventure by attracting more clients to her psychiatric booth at five cents per

the judicial eye there is cause for concern. It is here that we meet the bedrock of sober fact into which the idea that MERS in its representative role somehow does away with the need for an unbroken chain of assignments has sailed head-on and must eventually come to ruin.[12]

The industry's counterpoint to this is of course that the homeowner *agreed* in the mortgage contract to give the mortgage to MERS as nominee or agent for the lender and the lender's successors and assigns. But the argument is specious right off the bat because it assumes as proven the very thing it seeks to prove; that is to say, it only begs the question. *The mere fact that a securitized mortgage was originally given to the lender and the lender's successors and assigns does not by any stretch of the imagination (let alone even the most liberal of evidentiary standards) establish as a matter of law that the person now seeking to foreclose a mortgage by power of sale is in fact the lender's successor and assign—that she is the mortgagee*. Perhaps there is comfort to some in the warmth of wool that is so gently pulled; still we should decline the industry's invitation to mistake the cart for the horse when people's homes are at stake.[13]

On the same note, let us not forget that the MERS mortgage is clearly an adhesion contract the terms and implications of which the average person cannot reasonably be expected to understand—especially when trained judges and lawyers continue to have such difficulty doing so.[14] It is ambiguous with regard to a number of key points and

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visit may seem fanciful if not unthinkable—and yet a there is a real-life parallel in the nefarious industry practice of betting on certain mortgage loans to fail.

[12] The only possible exception to all of this would be for the various players to whom the mortgage was slated to pass during the securitization process to jointly own the mortgage—an idea that is of course reduced to complete nonsense by the mere fact of its inconsistency with the industry's need to insulate the mortgage loan from the long arm of any bankruptcy creditor by way of a series of true sales.

[13] It bears repeating that the issue here is ownership of the mortgage—the invalidity of which would not in itself entail an invalidation of the note; rather, it would simply transform the note, if proven to be enforceable, to an unsecured debt left to enforcement as a chose in action.

[14] Looking at the bigger picture, exposing the flaws in the MERS model will likely cause some palms to sweat; after all, mortgage-backed securities are an essential part of many an investment portfolio. But as we should have learned from tyrannous events in our past, whenever those we entrust as the keepers of our political freedom lend power to injustice for the sake of personal gain we begin a dark slog from which the return has proven itself to be lengthy, difficult, and painful. The holocaust against Native America, slavery, the witch hunts of McCarthy and McCarran—these were heralded by their proponents as legitimate expressions of American democracy when in fact they were nothing more than a licentious and concerted effort to project upon others a moral sense hobbled by the levers of hatred and fear in their own formative years, and the compensation for which lay in domination and control.

No greater harm has befallen our system of free enterprise in recent times than the economic collapse resulting from securitization run amok at the hands of unscrupulous individuals while those who might have intervened instead looked obligingly the other way. And whether by defect or design, MERS has contributed much of the space in which all of this has been allowed to happen. It is time to see the foreclosure crisis for what it is, in its entirety, and to find creative solutions that do not place the wreckage disproportionately on the backs of those who are the least to blame for it. That a homeowner should have known better than to take out a loan she could not reasonably afford does not remove from the hook of

falls woefully short of an essential element of every contract: certainty of terms on the subject of ownership. And even if this were not the case, a person may not contract away a statutory right,[15] and under Massachusetts foreclosure law the person exercising the power of sale must be *the mortgagee* or someone standing in the shoes of *the mortgagee*.[16] No matter how elegant the concept, the mere casting of MERS into the promiscuous role of serving as an agent for multiple players cannot do so.

MERS the Mortgagee

"But wait!" we are told. "Did the homeowner not also *agree* to give the mortgage directly to MERS in its own name—is MERS not also *the* mortgagee? And if so, would this not eliminate the need for assignments of the mortgage?" Again the question is specious. Yes, if MERS were the mortgagee and if it remained as such throughout the securitization process there would arguably be no need for interim assignments of the mortgage. In fact there would be no *possibility* of interim assignments because MERS would own the thing from beginning to end.

But the argument is undone by a single, nagging truth: *MERS is without question prevented by its own policies, procedures, and membership agreements from owning the*

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responsibility, moral or legal, industry players who not only made it possible but aggressively encouraged her to do so, all the while betting on the process to fail. The addiction had its enabler.

And to take a further step back, there is still that rather large elephant in the closet: securitization in its present form—the legitimacy of which is in many ways simply taken for granted. Although the subject lies beyond the scope of the present discussion, the questions abound. Who actually funded the loan; was the originating lender merely a straw employed by an investment group? Was the transaction actually the purchase of a promissory note merely disguised as a loan in order to obtain the mortgage as collateral? If the mortgage loan has made its way into a trust, are the investors not the real parties in interest in a subsequent foreclosure? How can mortgages be homogenized into a pool and years later upon default be reconstituted so as to retain their individual identity? If securitization is deemed to benefit the borrower by freeing capital for the lender and making the loan possible would this not make the borrower a third-party beneficiary of the trust agreements? And what of the failure to notify the borrower that her loan would be securitized? Had the truth been known, might this not have influenced the homeowner's decision to sign that particular mortgage? Might this not be considered an unfair and deceptive act or practice under Massachusetts law? The list goes on and on.

[15] *See, e.g. Culhane,* 826 F. Supp. 2d at 372. ("Without a claim to the underlying debt, MERS therefore cannot exercise the power of sale, regardless of the language in the mortgage contract giving it this power. *See Saurman,* 292 Mich.App. at 328-29, 807 N.W.2d 412. That the mortgagor consented to this contractual language does not operate as a waiver of the law's protection against foreclosure by the wrong entity. *Cf. Henry v. Mansfield Beauty Acad., Inc.,* 353 Mass. 507, 511, 233 N.E.2d 22 (1968) (Wilkins, C.J.) (holding that a party may not contract away the protection that a statute is intended to afford him, nor may the other party to the contract exempt itself from its duty to comply with such statute)").

[16] M. G. L. c. 183, § 21, which also requires that the person exercising the power of sale also comply strictly with the terms of the mortgage and with the statutes governing foreclosure by exercise of the power of sale.

mortgage and may act only in a representative capacity for the actual owner.[17] The same may be said for the promissory note—which can become an issue, given that many of the assignments of mortgage from MERS are of the note as well. It bears repeating: MERS owns nothing, and any doubt that it may act only in a representative capacity was firmly dispelled on November 16, 2010 by R.K. Arnold, Former President and CEO of MERSCORP, Inc., in his testimony before the United States Senate Committee on Banking, Housing and Urban Affairs,[18] though various depositions are instructive in this regard as

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[17] For example, ¶ 6 of the MERS Terms and Conditions in effect at the time many MERS mortgages were signed states, in part:

> The Member, at its own expense, shall promptly, or as soon as practicable, cause MERS to appear in the appropriate public records as the Mortgagee of record with respect to each Mortgage loan that the Member registers on the MERS® System. MERS shall serve as Mortgagee of record with respect to all such Mortgage loans *solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever* to any payments made on account of such Mortgage loans, to any servicing rights related to such Mortgage loans, or *to any Mortgaged properties securing such Mortgage loans.* MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such Mortgage loans or Mortgaged properties [emphasis added].

Paragraph 2 of the MERS Terms and Conditions states, in part:

> MERS and the Member agree that: (i) *the MERS® System is not a vehicle for creating or transferring beneficial interests in Mortgage loans* . . . [emphasis added].

Rule 8(b) of the MERSCORP Rules of Membership states, in part:

> The Member agrees and acknowledges that when MERS is identified as nominee (*as a limited agent*) of the Note owner in the Security Instrument, MERS, *as nominee, is the Mortgagee*, beneficiary, or grantee (as applicable), in the Security Instrument *on behalf of and for the benefit of the Note owner* [emphasis added].

Page 63 of the MERS System Procedures Manual (Transitional. 9/6/2011) (Transfer of Beneficial Rights) states, in part:

> Although the MERS System tracks changes in ownership of the beneficial rights for loans registered on the MERS System, *the MERS System cannot transfer the beneficial rights to the debt. The debt can only be transferred by properly endorsing the promissory note to the transferee.*

See also Culhane v. Aurora Loan Services of Nebraska, 826 F. Supp. 2d 352, 369-370 (D. Mass. 2011) ("MERS readily concedes that it does not own mortgage loans and '*has no rights whatsoever* to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or *to any mortgaged properties securing such mortgage loans* [emphasis added],'" quoting MERS *Terms & Conditions* at ¶ 2).

[18] The certified record of that hearing contains the following written question posed by Senator and Committee Member Richard C. Shelby and answered orally by Arnold:

> Q.2. Is Mortgage Electronic Registration Systems (MERS) considered a nominee or mortgagee for the mortgages that it registers?
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> A.2. MERS is a mortgagee who holds the mortgage lien *in a nominee capacity for the lender and the lenders successors and assigns.* When MERS is named as mortgagee in a mortgage document, it holds the legal title to that mortgage, while the beneficial interest in that mortgage flows to the owner of the promissory note. *A MERS mortgage makes clear that MERS is acting as the nominee (agent) of the lender-the original owner of the beneficial interest in the mortgage-and holds the legal title to the mortgage in this capacity.* Mortgage law is abundantly clear that a promissory

well and may be found through a simple search on the internet. So where, then, does that leave the mortgage contract in which MERS is clearly presented as both agent *and mortgagee*? If MERS cannot, in its representative role, do away with the need for an unbroken chain of assignments, and if it is absolutely barred by its own policies, rules, and regulations from *owning* the mortgage despite having been named as the mortgagee in the mortgage contract, [19] how can it then remain the mortgagee of record at the local

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> note owner may empower *an agent* with the authority to hold and enforce a mortgage lien *on behalf of the note owner*, and that *courts should make every effort to recognize this agency relationship.* (See Restatement (Third) Property, § 5.4, comment e) The practice of having *an agent* hold legal title to the mortgage for a note-owner long pre-dates the creation of MERS in 1995. It became a standard practice in the mortgage finance industry [emphasis added].

In his written remarks submitted at the same Senate Hearing, Arnold stated:

> An agency relationship arises where one party is specifically authorized to act on behalf of another in dealings with third persons, and the legal definition of a "nominee" is a "party who holds bare legal title for the benefit of others." Here, *the language of the Mortgage appoints MERS as nominee, or agent, for the lender and its successors and assigns* for the purposes set forth therein. *The Mortgage also grants MERS broad rights, again as nominee for the lender and the lender's successors and assigns,* "to exercise any or all" of the interests granted by the borrower under the Mortgage, "including but not limited to, the right to foreclose and sell the property; and to take any action required of the lender." *Thus, the language of the recorded Mortgage authorizes MERS to act on behalf of the lender* in serving as the legal titleholder under the Mortgage and exercising any of the rights granted to the lender thereunder [emphasis added].

Arnold further stated:

> *MERS acts as the designated "common agent" for the MERS member institutions in the land records*, which means that MERS holds the Mortgage lien on behalf of its members and acts *on their behalf as Mortgagee* [emphasis added].

The certified record of the Senate Hearing contains the following written question posed by Senator and Committee Member Sherrod Brown and answered orally by Arnold:

> Q.4. Mr. Arnold, does MERS derive any revenue from foreclosures?
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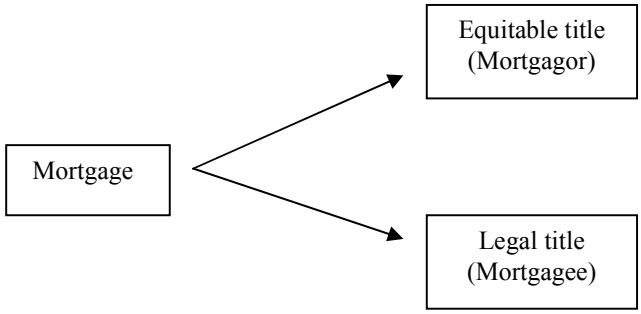
> A.4. No. Neither MERSCORP, Inc. nor its subsidiary, Mortgage Electronic Registration Systems, Inc., receive any fees or other form of compensation from foreclosures. MERS derives its revenue solely from its members. MERS makes its money through an annual membership fee (ranging from $264 to $7,500) based on organizational size, and through loan registration and servicing transfer fees. MERS charges a one-time $6.95 fee to register a loan and have Mortgage Electronic Registration Systems, Inc. serve as the common agent (mortgagee) in the land records. For loans where Mortgage Electronic Registration Systems, Inc. will not act as the mortgagee, there is only a small onetime registration fee ($0.97). This is known as an iRegistration. Transactional fees (ranging from $1.00 to $7.95) are charged to update the database when servicing rights on the loan are sold from one member to another. *MERS charges no fees and makes no money from mortgage origination or payments, from the securitization or transfer of mortgages, or from foreclosures done in its name* [emphasis added].

[19] A point that has been given short shrift in many foreclosure cases is that if ownership of the promissory note had been legally transferred and MERS remained the mortgagee, the two interests would necessarily have been separated. To argue that Massachusetts law allows the note and the mortgage to be held by different persons is to miss entirely a critical factor—namely, that ¶ 20 of the standard MERS mortgage requires that the two interests remain together. Their separation is therefore a breach of contract. *But see Abate v. Freemont Investment & Loan*, Case No. MISC 464855 (Land Court, Dec. 10, 2012). Bear

land office as the mortgage changes hands a number of times on the secondary market?[20] It is here that we meet the crux of the thing.

The Code Revealed

MERS claims only to hold *bare legal title* to the secured property. But as we trace the assertion carefully to its point of origin, we see that MERS has "solved" the assignment conundrum with a device as ingenious as it is sophistical. Recall that in Massachusetts a mortgage is already a divided interest—that is to say, the mortgagee holds bare legal title to the secured property and the mortgagor retains the beneficial interest or equity or redemption.[21] This "traditional" model may be visualized as such:



That said, by declaring MERS to be the actual mortgagee, what the MERS model actually does in Massachusetts (which is a title theory state) is to divide the *legal title itself* into a "legal" part and a "beneficial" part with MERS holding "bare legal title"

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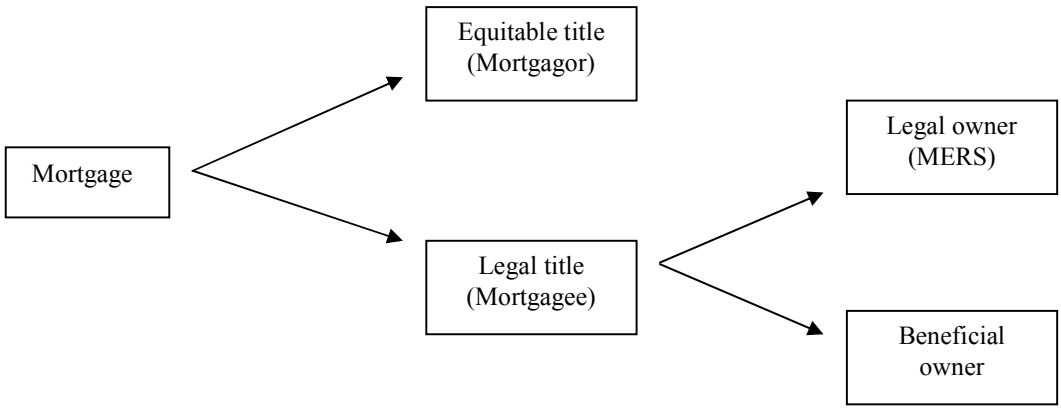
in mind that that language was placed in the mortgage contract by the industry itself. Moreover, a breach of the mortgage contract is necessarily a violation of M. G. L. c. 183, § 21, which requires, among other things, that the person who wants to exercise the power of sale must first comply with the terms of the mortgage contract.

See Ibáñez, 458 at 646 ("Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that 'one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void.' Citing *Moore v. Dick*, 187 Mass. 207, 211 (1905); *Roche v. Farnsworth*, 106 Mass. 509, 513 (1871) (power of sale contained in mortgage 'must be executed in strict compliance with its terms'); *McGreevey v. Charlestown Five Cents Sav. Bank*, 294 Mass. 480, 484 (1936)"). Thus even cases that began prior to *Eaton v. Federal National Mortgage Assn.*, 462 Mass. 569, (2012), the separation of note and mortgage may be in issue. The same point can be made if the mortgage is determined to have remained with the originating lender though the note is transferred.

[20] *See Ibáñez,* 458 Mass. 637, 649 (2011) and cases cited therein.

[21] *Id.* (When a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee). *Ibáñez,* 438 Mass. at 649.

while an unnamed "beneficial" owner "holds" the beneficial interest.[22] Thus the MERS model may be visualized in the following way:



What MERS is really saying, then, is that it holds legal title to a legal title. It is by this sleight of hand that it is able to "be" the mortgagee for recording purposes without actually "being" the mortgagee. It is a fiction of convenience, but one that is at once deceptive and misleading in Massachusetts: unless the originating lender has retained the mortgage the *real* holder of "bare legal title" is a *third person* whose identity remains unknown to the general public and MERS is at best acting as *that* person's agent or nominee. Stated a bit differently, what passes in the MERS model for the "beneficial interest" in the mortgage is not the real beneficial interest (which remains with the homeowner) but in fact the *legal title* MERS is "holding" *in a representative capacity* but does not own.[23]

This is something that may require a bit of concentration before it leaps with total clarity from the page, but once it does we readily see that it is deeply problematic. For one, no Massachusetts law supports the proposition that freedom of contract entails the right to create public law by private agreement—and this further division of the mortgage clearly suggests itself as a right enforceable in a court of law. But there is another point to be made: *the division of legal title means that the dual roles of agent and mortgagee played by MERS are both in fact representative roles—and that the term "MERS as mortgagee" is a coded reference to a unique species of agency designed to allow MERS to remain the mortgagee of record at the local land office without actually being the holder of the mortgage in any ordinary sense.*

[22] This in effect creates something akin to a mortgage or deed of trust within a mortgage and (bearing in mind that the mortgagor retains the beneficial interest in the mortgage) a further division of an already divided interest.

[23] *See* Arnold testimony, note 18, *supra*.

The importance of this singular fact cannot be overstated because it brings us back to the fact that the mere election of MERS as an agent for multiple players cannot and does not in itself transfer ownership of the mortgage from one to the next—nor does it provide the requisite proof of ownership by any recognized evidentiary standard. It is the Achilles heel of the MERS model.

The Legal Transfer of a Massachusetts Mortgage

The upshot here is that regardless of whether MERS is labeled as an agent or a mortgagee, *any assignment from MERS is worthless and conveys nothing as a matter of established law unless it is either from the originating lender or it is accompanied by a complete chain of written assignments.*[24] Recall also that an assignment of mortgage is the transfer of an interest in land; as such it must be in writing and signed by the person to be bound regardless of whether it is made directly by that person or by MERS acting on that person's behalf.[25] Any transfer that is not made accordingly constitutes a fatal break in the chain of ownership that will render a later assignment meaningless as it will any instrument or act based on that assignment.[26] And as the Supreme Judicial Court has

[24] The language in *Ibáñez* (458 Mass. at 651) that a foreclosing entity may demonstrate ownership of the mortgage by providing "a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage" is clearly not an "either-or" proposition. "The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under M. G. L. c. 183, § 21, and M. G. L. c. 244, § 14)." Therefore, the only reasonable interpretation is this: if there has been one transfer, one assignment will suffice; but where there have been multiple transfers—as in the case of securitization—there must be a chain of assignments without which there would be no way of knowing whether there was a break in the chain of ownership. Any contrary interpretation would therefore render the holding of the case meaningless. See also the Acts of 2012, c. 194, amending M. G. L. c. 244, § 14, effective November 1, 2012, which requires not only that there be an unbroken chain of assignments but that they be recorded as well.

[25] *Ibáñez,* 458 Mass. at 649. *See also,* M. G. L. c. 259, § 1 (Statute of Frauds) and M. G. L. c. 183, § 3, which states: "An estate or interest in land created without an instrument in writing signed by the grantor or by his attorney shall have the force and effect of an estate at will only, and no estate or interest in land shall be assigned, granted or surrendered unless by such writing or by operation of law."

[26] *See Ibáñez,* 458 Mass. at 651: "However, there must be proof that the assignment was made by a party that itself held the mortgage. *See In re Samuels*, 415 B.R. 8, 20 (Bankr. D. Mass. 2009). A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. *See In re Parrish,* 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005) ('If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant'). The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14)." [emphasis added]. Moreover, "[i]n Massachusetts, where a note has been assigned

clearly stated, "*there is nothing magical in the act of recording an instrument with the registry that invests an otherwise meaningless document with legal effect*."[27]

It is troubling to imagine the number of current titles that may be clouded because they have a MERS mortgage in their genealogy, even if there has been no foreclosure anywhere along the line. Such is the price paid for a continuing and systemic failure on the part of the legislature, the judiciary, and the industry to acknowledge and correct not the *objective* but the faulty *methodology* of the MERS model. Whatever its point of origin, that failure continues to undermine the presumptions of certainty and reliability that must inform any recorded transfer of an interest in land in a free and democratic society.

And lest we forget, it is in the waters muddied by the opacity of the MERS model that fraud can and has managed to avoid judicial scrutiny. Until the courts and the legislature are willing to step up, there will be little to prevent a person with no demonstrable ownership of a mortgage from crossing the street to that friendly neighborhood document preparation store and picking out whatever is missing from the record in order to impart a gloss of legitimacy to what will in reality be an illegal exercise of the power of sale. And without a truly insightful line of analysis, the courts will be none the wiser for it.

To repeat, the question is usually not whether MERS may represent consecutive holders of a mortgage interest[28] *(to which the answer is safely "yes," provided authority has been given in each case and MERS is acting within the scope of that authority) but whether in Massachusetts having MERS serve as the mortgagee of record does away with the need to execute a written assignment every time the mortgage is transferred on the secondary market (to which the answer is decidedly "no").* Thus regardless of whether or not a final "assignment" from MERS to a person seeking to exercise the power of sale is formally correct, beyond reproach, or even susceptible of correction, there is simply nothing for MERS to assign in the first place absent an unbroken chain of assignments; the facial correctness of an assignment from MERS is but a red herring. What this means for any foreclosure-related court action is clear: there is an evidentiary lacuna, a gaping hole the existence of which must at the very least take any motion to dismiss off the table lest we make a mockery of both procedural and substantive due process by allowing a mere pretender to the throne to dictate the terms of his succession,[29] and yet the point continues to be misconstrued in one way or another.

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but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage." *Ibáñez,* 458 Mass. at 652-653 (emphasis added).

[27] *Bevilacqua v. Rodriguez,* 460 Mass. 762, 770-771 (2011) (emphasis added).

[28] That is to say, ownership of the legal interest to the secured property.

[29] This would also constitute a violation of the statutes pertaining to foreclosure by exercise of the power of sale, and is in itself a false representation of material fact known or susceptible of actual knowledge and thus calculated to do an end-run around the proper procedures for carrying out the

A Methodology of Avoidance

The industry's first line of defense against the homeowner's legal challenge to a person's ownership of the mortgage at the time of the assignment from MERS is often simply to push the question beyond the court's reach. This involves a set of arguments, typically delivered in Massachusetts through a motion to dismiss, and two of which stand in relief against the rest—the one based on prudential standing, the other on a sophistical misapplication of Massachusetts law. These arguments are then channeled by industry hirelings eager to extol for judge and jury alike the many virtues of an expedience for which the deracination of decency and compassion from our notions of fair play and justice is surely but a diminutive and trivial price to pay—a prime example of what can happen when an adversary system is set adrift from its moral anchor.

That said, the first such argument, heralded with Ciceronian fullness and fanfare, is that the person who is losing her home somehow lacks *standing* to question the validity of an assignment because she is neither a party nor a third-party beneficiary but in fact a total stranger to that instrument. How in a case of wrongful foreclosure such hogwash

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foreclosure of a mortgage. At common law in Massachusetts, the elements of fraudulent misrepresentation are that the defendant made a false representation of material fact with knowledge of its falsity for the purpose of inducing the plaintiff to rely upon it and that the plaintiff relied upon it to his detriment. *Reisman v. KPMG Peat Marwick LLP.,* 57 Mass. App. Ct. 100, 108 (2003), citing *International Totalizing Sys. v. PepsiCo, Inc.*, 29 Mass. App. Ct. 424 , 431 (1990). The party making the representation need not know that the statement is false if the fact it represents is susceptible of actual knowledge. See *Vmark Software, Inc. v. EMC Corp.,* 37 Mass. App. Ct. 610, n. 9 (1994), citing *Zimmerman v. Kent,* 31 Mass. App. Ct. 72, 77 (1991). See also Nolan and Sartorio, *Tort Law*, 37 M.P.S. § 8.2 (3rd ed. 2005); 37 C.J.S., *Fraud*, § 13 (2008); Rest. 2d Torts, § 525 (1977).

Nor must the Defendants have had an intent to deceive. *See Harris v. Delco Products, Inc.,* 305 Mass. 362, 364-365 (1940) ("If a statement of a fact which is susceptible of actual knowledge is made as of one's own knowledge, and is false, it may be made a foundation of an action for deceit without further proof of an actual intent to deceive.") quoting *Chatham Furnace Co. v. Moffatt,* 147 Mass. 403, 404 [1888]; *Powell v. Rasmussen,* 355 Mass. 117 , 118 (1969); *Yorke v. Taylor,* 332 Mass. 368, 371 (1955). *See also* Nolan and Sartorio, *Tort Law*, 37 M.P.S. § 8.3, pp. 250-251 (3rd ed. 2005); and again, "It is the general rule that '[i]f a statement of fact which is susceptible of actual knowledge is made as of one's own knowledge and is false, it may be the basis for an action of deceit without proof of an actual intent to deceive.'" *Kozdras, supra* at 43, quoting *Pietrazak v. McDermott,* 341 Mass. 107, 110 (1960).

On the question of third-party reliance, *see Reisman v. KPMG Peat Marwick LLP.,* 57 Mass. App. Ct. 100, 108 (2003) ("The Reismans were not required to show that Peat Marwick's misstatements were made with the specific purpose of inducing the Reismans' reliance. They could also satisfy their burden by showing, as they did, that they were among those whom Peat Marwick had reason to expect would rely upon its statements"). In this regard, *see also* the Restatement (Second) of Torts § 533 (1977). Statements made to the Court in the Servicemembers action and to registry officials involve such third-party reliance. For an excellent analysis of the subject, *see Bridge v. Phoenix Bond & Indemnity Co.,* 128 S.Ct. 2131 (2008). *Also see* Nolan and Sartorio, *Tort Law*, 37 M.P.S. § 8.4, pp. 251-252 (3rd ed. 2005).

With regard to negligent misrepresentation, *see Gossels v. Fleet National Bank,* 453 Mass. 366, 371-372, *citing Nycal Corp. v. KPMG Peat Marwick LLP,* 426 Mass. 491, 495-496 (1998), quoting Restatement (Second) of Torts § 552 (1977). *See also Golber v. BayBank Valley Trust Co.,* 46 Mass. App. Ct. 256 , 257 (1999); Restatement (Second) of Torts § 552(2).

could be taken seriously will someday emerge as a mystery of the times. Yes, the issue is essentially one of prudential standing—that is to say, one of a collection of judicially imposed limitations on who may access the courts, a cardinal component of which is the real party in interest doctrine. And yes, a person who does not have a legal right under applicable substantive law to enforce an obligation or to seek a remedy with regard to that obligation is not a real party in interest.

But that is precisely the point: the homeowner in a servicemembers action or a wrongful foreclosure suit in Massachusetts is not trying to enforce an obligation created *by the assignment*, nor is she seeking a remedy with regard to any such obligation; therefore, the question of whether or not she is a party or third-party beneficiary is wholly irrelevant. Instead, *she is seeking to enforce the mortgage contract itself—a contract to which she has at all relevant times been a party, and the terms of which she has both constitutional*[30] *and prudential standing to enforce. And an assignment by one who does not in fact own the mortgage is a material breach of the mortgage contract as well as a violation of state law*.[31] The reasons for this are as follows:

For one, the mortgage is a written contract,[32] and when interpreting a written contract, "the court gives full effect to all the terms expressed by the parties. . . . It is not the role of the court to alter the parties' agreement."[33] The MERS mortgage contains a power of sale, and therefore also includes by reference the power of sale that is contained in M. G. L. c. 183, § 21 and further regulated by M. G. L. c. 244, §§ 11-17C.[34] In other words, *there is a functional identity between the terms of Section 21 and the terms of the mortgage contract itself; therefore a violation of the one is necessarily a breach of the other.* And M. G. L. c. 183 § 21 and M. G. L. c. 244, § 14 both make clear that only the

[30] The loss of one's home to a wrongful foreclosure is clearly an injury-in-fact redressable through legal process.

[31] The homeowner is of course directly or by implication also using the assignment as evidence of fraud, which is clearly not an attempt to enforce or seek a remedy with regard to an obligation created by the assignment. By the same token, there is no discernable reason why the homeowner should not be able to question the trust documents—specifically to point out that ownership of the mortgage did not pass to the trust according to the (typically) governing laws of the state of New York, whether because the closing date and REMIC start-up date had passed, the loan was non-performing at the time, or for some other reason. Not least, it is also odd to say that because the homeowner has no beneficial interest in the assignment she has no interest in it at all, given that it is *her* mortgage that is being assigned and an assignment from MERS without more might effect her in some way. *See, e.g. Culhane* 826 F. Supp. 2d at 368 ("running the legal title through MERS (as opposed simply to registering such title on the MERS registry) creates a cloud on the title which may expose subsequent purchasers to adverse claims [citation omitted] and thus reduces the value of the subject property, which, in turn, could well expose Culhane to a greater deficiency judgment upon foreclosure. This establishes her standing to challenge MERS's involvement here.").

[32] *U.S. Bank National Association v. Ibáñez,* 17 LCR 679, MISC 08-384283, n. 21 (2009) (Memorandum and Order on the Plaintiffs' Motions to Vacate Judgment), *aff'd* 458 Mass. 637 (2011).

[33] *Rogaris v. Albert,* 431 Mass. 833, 835 (2000).

[34] *Ibáñez*, 458 Mass. at 646-647.

actual holder of the mortgage or the mortgage holder's successor and assign may exercise the power of sale.[35]

Why any court would fail to consider this elementary fact is open to speculation, though it is troubling—especially in light of the inordinate lengths to which some judges have gone, at times *sua sponte*, in order to legitimate the MERS model in its entirety, whether by walking on the wild side of both reason and logic, engaging in remarkable flights of jurisprudential fancy, or simply by allowing procedural mechanisms to throw the entire substantive case under the bus, so to speak. Fortunately, others are have taken a more penetrating and enlightened approach, recognizing in one degree or another the homeowner's right to question the assignor's ownership of the mortgage.[36]

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[35] Section 21 states, in relevant part, "*But upon any default* in the performance or observance of the foregoing or other condition, *the Mortgagee* or his executors, administrators, successors or assigns *may sell the Mortgaged premises . . . first complying with the terms of the Mortgage and with the statutes relating to the foreclosure of Mortgages by the exercise of a power of sale* . . . [emphasis added]." The requirement of a default in Section 21 is a subject we leave for another day, though it is densely packed and far from simple. Was the "loan" actually a loan or a disguised purchase of the mortgage asset by an investment trust previously funded by its investors—a transaction by which the originating lender was paid in full? That said, consider the position of the *Ibáñez* court, 458 Mass. at 652-53:

> In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. . . . *In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another.* G. L. c. 183, § 21, inserted by St. 1912, c. 502, § 6 [emphasis added].

Massachusetts General Laws c. 244, § 14 may, depending on one's interpretation, expand the list of those who may foreclose to include the mortgagee's representative as well. But the division of bare legal title itself into "legal" and "beneficial" parts—the sine qua non of the MERS model—does not square with the *Ibáñez* court's articulation of the law because the "beneficial" owner in the MERS model could not exercise the statutory power of sale nor could the "legal" owner (vide MERS) do so. Why? Because MERS is acting solely in a representative capacity—thus if we follow the edicts of both the MERS model and Massachusetts law, there is no one with the authority to exercise the power of sale, all of which goes to evince a further unraveling of the MERS model.

[36] See, *Juarez v Select Portfolio Servicing, Inc.*, No 11-2431 slip op. at 14-15 (1st Cir. February 12, 2013) (" . . . [the plaintiff] questions whether the entity that foreclosed her property actually had the power of sale at the time the foreclosure took place."); *Culhane v. Aurora Loan Services of Nebraska*, No. 12-1285, slip op. at 9-15 (1st Cir. February 15, 2013) (" . . . unlike an ordinary debtor who could challenge an assignment as a defense upon being haled into court by the assignee seeking to collect on her debt, [] a Massachusetts mortgagor would be deprived of a means to assert her legal protections without having standing to sue. As such *we hold* only that Massachusetts mortgagors, under circumstances comparable to those in this case, have standing to challenge a mortgage assignment.") *See also Lacy v. BAC Home Loans Servicing, LP,* No. 10-19903-JNF. Adv. P. No. 10-1249 (Bankr. D. Mass. July 12, 2012); *Drouin v. American Home Mortgage Servicing, Inc.,* (No. 11-cv-596-JL, 2012, Opinion No. 2012 DNH 089, WL 1850967 (D. N.H., May 18, 2012)). *See also* 6A C.J.S. *Assignments* § 115, at 780 (1975) ("A debtor may, generally, assert against an assignee all equities or defenses existing against the assignor prior to notice of the assignment, any matters rendering the assignment absolutely invalid or effective, and the lack of

This is the far more sensible approach; after all, the homeowner's position is that her home was taken or may yet be taken by a stranger to the mortgage whose sole claim of ownership is based on a purported assignment from a person whose identity remains unknown due to the opacity of the MERS system but who, absent a complete and unbroken chain of proper written assignments, could not possibly under Massachusetts law have held the mortgage at the time of the assignment and therefore has or had no power of sale. If an assignor in fact had no power of sale, exercise of that power by the assignee would be *a material breach of the mortgage contract itself.* [37]

Although a full analysis of the subject would carry us beyond the scope of the present discussion, the point is fairly made and bears repeating: *an "assignment" of the mortgage from one who is not and cannot by law be the mortgagee is at once a violation of state foreclosure laws—laws that are remedial in nature and meant to protect the homeowner—*[38] *and a breach of the mortgage contract itself.*[39] To say that an assignment cannot be challenged for want of standing on the homeowner's part is to turn the reality on its head: *it is the person attempting to exercise the power of sale who, with no interest in the mortgage, lacks standing to do so.* And as previously mentioned, adventures of this sort might ultimately lead to violations of both state and federal criminal statutes as well.[40]

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plaintiff's title or right to sue."); RESTATEMENT (SECOND) OF CONTRACTS § 336(1) (1981) ("By an assignment the assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor; and if the right of the assignor would be voidable by the obligor or unenforceable against him if no assignment had been made, the right of the assignee is subject to the infirmity.").

[37] Here, too, the argument should arguably apply to the trust documents; the homeowner is not seeking to enforce these instruments but is rather pointing out that there have been actions taken in violation of their material terms, that these actions are therefore void under the governing laws of New York, and that the mortgage loan could therefore not have passed to the trust—all of which would mean that the actual assignor of that final assignment from MERS did not hold the mortgage, which would in turn boil down to a material breach of the mortgage contract, a fraudulent misrepresentation, and a violation of the statutes pertaining to foreclosure by exercise of the power of sale.

[38] *See U.S. Bank National Association v. Ibáñez*, 17 LCR 679, 687 (2009) (Memorandum and Order on the Plaintiffs' Motions to Vacate Judgment), *aff'd* 458 Mass. 637 (2011)

[39] M. G. L. c. 183, § 21.

[40] Depending on the conduct revealed, Federal statutes that may have some degree of applicability include: 18 USC § 2—Principals; 18 USC § 3—Accessory after the fact; 18 USC § 4—Misprision of felony; 18 USC § 5—United States defined; 18 USC § 6—Department and agency defined; 18 USC § 8—Obligation or other security of the United States defined; 18 USC § 10—Interstate commerce and foreign commerce defined; 18 USC § 12—United States Postal Service defined; 18 USC § 13—Laws of States adopted for areas within Federal jurisdiction; 18 USC § 18—Organization defined; 18 USC § 20—Financial institution defined; 18 USC § 21—Stolen or counterfeit nature of property for certain crimes defined; 18 USC § 27—Mortgage lending business defined; 18 USC § 241—Conspiracy against rights; 18 USC § 242—Deprivation of rights under color of law; 18 USC § 371—Conspiracy to commit offense or to defraud United States; 18 USC § 401— Power of court; 18 USC § 402—Contempts constituting crimes; 18 USC § 656—Theft, embezzlement, or misapplication by bank officer or employee; 18 USC § 657—Lending, credit and insurance institutions; 18 USC § 891—Definitions and rules of construction; 18 USC §

A second device used to prevent the homeowner from questioning an assignment from MERS is to assert that the assignment is presumed valid if the person who signed it "purported" to do so on behalf of the actual holder—this based on a lop-sided reading of M. G. L. c. 183, § 54B.[41] Like the standing argument, it has gained some mileage in the courts, and like the standing argument, it has little to recommend it and opens wide the door to all sorts of mischief.

As a preliminary matter, yes, Section 54B does use the term "purport." But it also makes it clear that the person "purporting" to sign is doing so *in a representative capacity on behalf of the entity holding the mortgage* (which for one means that MERS cannot "purport" to sign on behalf of the entity holding the mortgage *if MERS itself is the entity holding the mortgage*). In point of fact, the words "entity holding the mortgage" appear five times in the statute and cannot be dismissed out-of-hand.[42] Why does this matter?

892—Making extortionate extensions of credit; 18 USC § 893—Financing extortionate extensions of credit; 18 USC § 981—Civil forfeiture; 18 USC § 1001—Statements or entries generally; 18 USC § 1002—Possession of false papers to defraud United States; 18 USC § 1004—Certification of checks; 18 USC § 1005—Bank entries, reports and transactions; 18 USC § 1006—Federal credit institution entries, reports and transactions; 18 USC § 1007— Federal Deposit Insurance Corporation transactions; 18 USC § 1010—Department of Housing and Urban Development and Federal Housing Administration transactions; 18 USC § 1012—Department of Housing and Urban Development transactions; 18 USC § 1032—Concealment of assets from conservator, receiver, or liquidating agent; 18 USC § 1033—Crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce; 18 USC § 1341—Frauds and swindles; 18 USC § 1342—Fictitious name or address; 18 USC § 1343—Fraud by wire, radio, or television; 18 USC § 1344—Bank fraud; 18 USC § 1346—Definition of "scheme or artifice to defraud"; 18 USC § 1348—Securities and commodities fraud; 18 USC § 1349—Attempt and conspiracy; 18 USC § 1350—Failure of corporate officers to certify financial reports; 18 USC § 1510—Obstruction of criminal investigations; 18 USC § 1511—Obstruction of State or local law enforcement; 18 USC § 1956—Laundering of monetary instruments; 18 USC § 1957—Engaging in monetary transactions in property derived from specified unlawful activity; 18 USC § 1960—Prohibition of unlicensed money transmitting businesses; 18 USC § 1961—Definitions; 18 USC § 1962—Prohibited activities; 18 USC § 1963—Criminal penalties; 18 USC § 1964—Civil remedies; 18 USC § 2311—Definitions; 18 USC § 2314—Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting; 18 USC § 2315—Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps. *See also* M. G. L. c. 266 § 35A; M. G. L. c. 267 §§ 1, 5, among others.

[41] Section 54B states, in part, "Notwithstanding any law to the contrary, (1) a discharge of mortgage; (2) *a release, partial release or assignment of mortgage;* (3) an instrument of subordination, non-disturbance, recognition, or attornment by the holder of a mortgage; (4) any instrument for the purpose of foreclosing a mortgage and conveying the title resulting therefrom . . . *if executed before a notary public, . . . by a person purporting to hold the position of* president, vice president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent, asset manager, or other similar office or position, including assistant to any such office or position, *of the entity holding such mortgage*, or otherwise purporting to be an authorized signatory *for such entity*, or acting under such power of attorney *on behalf of such entity*, acting in its own capacity or as a general partner or co-venturer of *the entity holding such mortgage*, shall be binding upon *such entity* and shall be entitled to be recorded, and no vote of the entity affirming such authority shall be required to permit recording.

[42] *See Deblois v. Commissioner of Corporations and Taxation*, 276 Mass. 437, 438 (1931) ("It is a canon of statutory interpretation not to treat any words as superfluous but to give to all the language some

Because the assignment to a securitization trust must be the last of *several* transfers—that is to say, *the mortgage does not and cannot pass directly from the originating lender to the securitization trust and still be securitized*. Thus even if MERS is acting as an agent, it is both logically and legally impossible for that final assignment from MERS to be on behalf of anyone who actually owns the mortgage. Why? Because without an unbroken chain of interim assignments its ownership never passed from the originating lender or the last person to whom it was properly assigned.[43] There is simply no one on whose behalf MERS can "purport" to make the assignment.

That said, there is more. To station 54B at the gates of an assignment, fiery sword in hand, is to flout a well-settled canon of statutory construction: that statutes must when possible be *harmonized* so as to achieve "a consistent body of law."[44] There is no way by logic or law to get around the fact that such an interpretation of Section 54B flies wholly in the face of the Massachusetts foreclosure statutes—specifically M. G. L. c. 183, §21 and M. G. L. c. 244, § 14, both of which require that the person exercising the power of sale *own* the mortgage or at least stand in the owner's shoes. In fact the interpretation urged by the industry effectively *repeals* both of these statutes to the extent that it blocks any inquiry into the fact that the assignor for whom MERS assigned the mortgage could not possibly have held the mortgage.[45] This finds resonance too as a violation of public

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meaning, and not to overemphasize one word or part at the expense of another word or part, to the end that so far as possible the enactment shall constitute a consistent and harmonious whole capable of producing a rational result in consonance with the presumed intent of the Legislature.").

[43] Assuming, of course, that the originating lender still exists.

[44] *See Thurdin v. SEI Boston, LLC,* 452 Mass. 436, (2008); *Labranche v. A.J. Lane & Co.*, 404 Mass. 725, 728-29 (1989) ('[W]here two or more statutes relate to the same subject matter, they should be construed together so as to constitute an harmonious whole consistent with the legislative purpose.'") citing *Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds*, 382 Mass. 580, 585 (1981) ("'[W]e assume, as we must, that the Legislature was aware of the existing statutes' when it enacted the subsequent statute." *See also Hadley v. Amherst*, 372 Mass. 46 , 51 (1977) ("We will find an implied repeal of one statute by another only when 'the prior statute is so repugnant to, and inconsistent with, the later enactment that both cannot stand"); *Boston v. Board of Educ.*, 392 Mass. 788, 792 (1984), quoting *Commonwealth v. Graham*, 388 Mass. 115 , 125 (1983). [Note 6] (Implied repeal of a statute is not favored); *Dedham Water Co. v. Dedham*, 395 Mass. 510 , 518 (1985); *Cohen v. Price*, 273 Mass. 303, 308 (1930). All that it would take to harmonize Section 54B with other statutes pertaining to foreclosure by exercise of the power of sale is a threshold determination that the person on whose behalf the signatory is signing is in fact the holder of the mortgage. Why any court would disavow the inherent authority to do so is a question left for another day.

[45] There is no question that when an application of Section 54B allows to pass unnoticed the fact that the person on whose behalf the signer "purports" to sign does not own the mortgage, it conflicts with Section 21, M. G. L. c. 244, § 14 and other statutory provisions pertaining to foreclosure by power of sale. Since, as between Section 21 and Section 54B, Section 21 is the more specific with regard to exercise of the power of sale, it should not be enervated by too narrow a reading of Section 54B. *See Commonwealth v. Harris*, 443 Mass. 714, 725-726 (2005) ("As we attempt to harmonize these statutes, it is not for us to determine which of them is more weighty or worthwhile and to allow that statute to dominate. [ ] Instead, we must seek to apply them in a manner that, to the greatest extent possible, serves the policies underlying both."). Section 54B deals expressly with transfers, not the power of sale and should not impact negatively on Section 21.

policy because it allows Section 54B to serve as an open invitation to fraud and a device by which an unscrupulous lender (or its purported successor) can remove the taint from an illegal foreclosure.[46] Finally, a simple threshold determination of ownership made before an application of Section 54B is hardly an impossibility and would bring it in harmony with the foreclosure statutes.

But to peel yet another layer from the thing is to stumble upon some constitutional difficulty as well. For one, there is the question of substantive due process, the doctrine of fundamental fairness.[47] Consider first the less onerous possibility—that we are dealing with the misapplication of the statute rather than its facial invalidity. Still, it would strain the bounds of credulity to say that it does not place an unjustifiable burden on the homeowner's fundamental right to be protected in the enjoyment of her property[48] when Section 54B is applied in such a way that she is denied any meaningful opportunity to reveal that the person who assigned her mortgage did not own it.

The possession and enjoyment of one's home is a fundamental right deeply rooted in this Nation's history and tradition[49] and so implicit in the concept of ordered liberty that "neither liberty nor justice would exist if they were sacrificed."[50] One might think, then, that the application of Section 54B urged by the industry should be reviewed—and, accordingly, disallowed—by a standard of strict scrutiny. There is simply no legitimate and compelling governmental interest in allowing a foreclose by power of sale to be based on assignment where the assignor had no enforceable interest in the mortgage assigned. But even if we were to apply the less stringent "rational basis" test, it would border on nonsense to posit that the misrepresentation of material fact sanctioned by the misapplication of Section 54B is by any stretch of the imagination reasonably related to the furtherance of a valid state interest.[51]

Then there is Procedural due process—which, according to the Massachusetts Constitution, requires that a statute or governmental action that has survived substantive

[46] A prominent Federal District Court judge has made a similar point. See *Culhane v. Aurora Loan Servicers of Nebraska*, 826 F.Supp.2d 352, 378 (2011) ("As the MERS system demonstrates, even strict compliance with the statutory terms does nothing to ensure that real property is not conveyed fraudulently."). The Culhane court nonetheless felt its hands were tied by industry application of Section 54B and the fact that the homeowner, Oratai Culhane, was not a party to or a third-party beneficiary of the assignment.

[47] *See* the Declaration of Rights, Mass. Const. Pt. I, arts. 10, 11.

[48] Mass. Const. Pt. I, art. X.[48] *See Gillespie v. City of Northampton*, 460 Mass. 148, 153 (2011).

[49] *Gillespie*, 460 Mass. at 153, citing *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion).

[50] *Id.*, citing *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997), quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937).

[51] *Id*.

due process scrutiny be implemented in a fair (and thus impartial) manner.[52] Clearly a foreclosure by a person without right is "an erroneous deprivation through the procedure used"—which is, again, an outright denial of the homeowner's right to expose the fact that the assignor did not have an enforceable interest in the mortgage when MERS made the assignment on his behalf.

And not least, there is equal protection.[53] The promulgation of Section 54B by the Massachusetts Legislature has, directly and indirectly, resulted in classification on several levels. The class of interest here is that of persons whose mortgages are assigned by or on behalf of the actual holder of the mortgage. There would appear to be nothing facially improper about this classification because it pertains to the statutory purpose of streamlining, among other things, the process by which a mortgage may be is assigned.

However, the *application* of Section 54B urged by the industry results in the inclusion, in that class, of the homeowner who is dissimilarly situated to others in the class; specifically, it lumps together homeowners who face foreclosure based upon a *legitimate* assignment from a person who in fact owns the mortgage[54] and homeowners who face foreclosure based upon an assignment that is *illegitimate* because it is from a person who does not own the mortgage; thus the industry's application of Section 54B makes the statute *over-inclusive* and produces an "arbitrary and irrational" result that is constitutionally impermissible.[55]

Conclusion

[52] Mass. Const. Pt. 1, art XI ("Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."); *Gillespie*, 460 Mass. at 156, citing *Aime v. Commonwealth*, 414 Mass. 667, 674 (1993); *Mathews v. Eldridge*, *supra*; *Matter of Angela*, 445 Mass. 55, 62 (2005), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[53] Article I: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; *that of acquiring, possessing and protecting property*; in fine, that of seeking and obtaining their safety and happiness. . . . "

[54] To posit that the statutory classification was intended to embrace and legitimate acts of fraud would be to render the statute *facially* unconstitutional. As it is difficult to imagine this to be the case, there is hopefully no reason to address the subject here.

[55] *See Pinnick v. Cleary*, 360 Mass. 1, 28. (1971), cited in *Gillespie*, 460 Mass. at 159; Mass. Const. Pt. I art. I as amended. *See Murphy v. Commissioner of the Dep't of Indus. Accs.*, 415 Mass. 218, 226-227 (1993); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) as cited in *Gillespie*, 460 Mass. at 158-159. There is some debate that while Section 54B was an attempt to bring Massachusetts more in line with national standards it greased the skids for the mortgage and real estate industries at the expense of a traditional democratic recording system that was perhaps long in the tooth but nonetheless preserved transparency.

Given the industry's contribution to the foreclosure crisis one might wish for it to be as generous now in the pursuit of creative solutions that do not place the entire wreckage of its mischief and miscalculation squarely on the shoulders of homeowner and county land office alike. One might also wish that it not continue to doggedly follow a course of tactical evasion by trying to push the entire subject beyond the range of judicial scrutiny, and that it not wait to be dragged kicking and screaming to the precipice of reality and given that final nudge by judges and legislators who have the insight, integrity, and courage to do so. Consider the words of Judge Herbert Kramer of the New York Supreme Court:

> This Court emphatically now joins the judicial chorus who have been wary of the paperwork supplied by plaintiffs and their representatives. There is ample reason for Chief Judge's requirement for an attorney affirmation in residential foreclosure cases. As stated by Chief Judge Jonathan Lippman, "we cannot allow the courts in New York State to stand idly and be party to what we now know is a deeply flawed process, especially when that process involves basic human needs-such as a family home-during this period of economic crisis." [56]

The adversary system was meant to sharpen the issues, not to muddy or avoid them altogether. It is time to acknowledge the fact, especially where a family's home is at stake and there are alternatives to foreclosure.

[56] HSBC Bank USA v. Sene, No 18600/09, slip op. 50352(U) (N.Y. Sup. Ct. February 28, 2012).